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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JESUS A. PERAZA, Defendant and Appellant.	B206399 (Los Angeles County Super. Ct. No. TA086587)

APPEAL from a judgment of the Superior Court of Los Angeles County. William R. Chidsey, Jr., Judge. Affirmed as modified.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, appellant Jesus Alberto Peraza was convicted of the first degree murder of Ruben Martinez (count 1), the attempted willful, deliberate and premeditated murder of Daniele S. (count 2), and the aggravated mayhem of Daniele S. (count 3).[1] The jury also found that firearms and street gang allegations were true. At bifurcated proceedings, the court found that a juvenile court adjudication of robbery qualified as a strike, and appellant had two prior convictions that were prior separate prison terms for the purpose of Penal Code section 667.5, subdivision (b) (section 667.5(b)).[2]

Appellant was represented by appointed counsel during the trial. He brought in retained counsel for the purpose of a motion for new trial and sentencing. The court granted numerous continuances for preparation of a motion for new trial.

It finally denied another continuance for further discovery, rejected the motion for new trial, and sentenced appellant to 130 years to life in prison.

Appellant has raised numerous issues regarding the trial and posttrial proceedings. We strike one of the section 667.5(b) findings and otherwise affirm.

FACTS

1. Testimony of Daniele S.

Around midnight on September 5, 2006, Daniele and her boyfriend, the murder victim Martinez, were sitting in a truck, eating some food they had purchased. Daniele was in the driver's seat and Martinez was in the front passenger seat. They were parked across the street from the home of Martinez's friend, Alex G. Alex and his brother Eric were standing beside the truck, talking with Martinez.

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[1] The record contains multiple spellings of Daniele's name. We use the spelling she provided when she testified.

Count 3 was eventually stayed pursuant to Penal Code section 654.

[2] Subsequent statutory references are to the Penal Code unless otherwise stated.

Three cars rounded the corner, drove toward the truck, and stopped in the middle of the street. A man got out of the middle car, holding a gun. He walked in front of the truck and spoke to Alex and Eric. His words were: "This is BN. Where you fools from?" Alex responded that "he was from Maywood, but he didn't gangbang anymore." The gunman ordered Alex to lie on the ground and turned toward Martinez, who had stayed silent in the truck. The gunman fired multiple shots at Martinez's chest and then walked back to the car he had left.

Daniele reached across her body with her left hand and held Martinez. He told her he could not breathe and needed to go to a hospital. She turned on the truck's ignition with her right hand. The gunman apparently heard the sound of the truck's engine. He walked back toward the truck and stopped near "the front driver's side of the tire." He fired at Daniele at least four times and then left.

One of the bullets hit Daniele in the middle of the back, paralyzing her legs. She spent a month in the hospital and has needed a wheelchair ever since. She was unable to positively identify anyone as the shooter. When she was shown a six-pack photographic lineup (six-pack), she said the photo of appellant and the photo of another man looked familiar to her.[3]

2. Testimony of Alex G.

Alex's testimony differed from Daniele's in one major respect: Alex knew appellant and positively identified him as the shooter.

Alex testified that he was standing outside the truck with Eric. Martinez, who was in the truck, had gang tattoos all over his body and above his eyebrow. Three cars drove up. Two gunmen jumped out. One of them was appellant. Alex recognized appellant because, years earlier, they attended Paramount High School at the same time.[4]

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[3] Detective Schoonmaker later testified that when he showed Daniele the six-pack, Daniele first said that appellant's photo and another photo looked familiar to her. Then, she looked again at appellant's photo and said he resembled the shooter.

[4] Appellant was 28 years old when he was sentenced on this case.

Appellant yelled, "Brown Nation, Paramount." He was holding a semiautomatic weapon. He approached Alex and asked, "Where you guys from?" Alex understood that the question concerned his gang affiliation. He answered, "Maywood Locos, but I don't gangbang [any] more." Appellant ordered Alex to "get down." Alex refused and backed up. Appellant turned toward Martinez and said, "Look at this fool." He fired multiple shots at Martinez. Alex and Eric ran away. When Alex returned, he saw that Martinez and Daniele were inside the truck, wounded. The whole incident happened quickly, in about a minute.

Alex was interviewed by the police later that night. He knew there was a code of gang behavior that meant a "snitch" could be killed, so he did not tell the police that appellant was the shooter. During a second interview, he selected appellant's photo from a six-pack. At a third police interview, which also included two deputy district attorneys, he said he knew appellant. At the time of the trial, he was still concerned about the consequences of testifying, but he was no longer afraid, as he and his family had been relocated to another state. Before that relocation, he had spent his entire life in the area around Lakewood. He knew appellant as "Chuy" of the "Brown Nation Paramount" gang. Martinez, the murder victim, belonged to the "East Side Paramount" gang, the rival of Brown Nation Paramount.

3. Other Evidence

Martinez sustained nine gunshot wounds, mainly in his chest and abdomen. Several of the shots were fatal.

At the crime scene and inside the truck, there was physical evidence that many bullets were fired.

School records showed that appellant attended Paramount High School from 1994 to 1995.

In May 1999, over seven years before the incident, appellant was interviewed by Detective Mark McGuire during the investigation of an attempted murder case in which appellant was the victim. Appellant told McGuire he belonged to the Brown Nation Paramount gang and thought he was shot by members of the East Side Paramount gang.

Detective Schoonmaker testified that when he first met with Alex, Alex described the incident but did not identify anyone. At their second meeting, Schoonmaker told Alex that he had learned through his investigation that Alex knew who the shooter was but was afraid to give the police that information. Alex "sat back in kind of a defeated slump" and then reluctantly selected appellant's photo from a six-pack. In a later interview, Alex provided appellant's gang moniker, "Chuy."

4. The Gang Expert

Detective Phillip Santisteven of the sheriff's department testified as a gang expert. He described the typical behavior of gang members, such as gaining respect by committing violent crimes, retaliating for things that are done to the gang, and punishing snitches. He discussed the history and territory of appellant's and Martinez's gangs, the rivalry between them, their graffiti, and the robbery convictions of two members of appellant's gang. In Santisteven's opinion, based on a detailed hypothetical that listed the facts of the crime, the shootings were committed to promote appellant's gang, Brown Nation Paramount. Moreover, while he was preparing to testify in this case, Santisteven learned that a member of Brown Nation Paramount gang was murdered earlier on the day appellant shot Martinez. Santisteven believed that appellant and his fellow gang members were out on a hunting expedition, seeking retaliation, when they saw Martinez and Daniele inside the truck.

ISSUES REGARDING THE TRIAL

1. Sufficiency of the Evidence

On counts 2 and 3, appellant was convicted of premeditated attempted murder and aggravated mayhem as to Daniele. He contends that there was insufficient evidence of premeditation on count 2 and of specific intent on count 3. Utilizing the appropriate standard of review (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), we find sufficient evidence for those elements.

The true test for premeditation and deliberation is the extent of reflection. Cold, calculated judgment may be arrived at quickly. (*People v. Hughes* (2002) 27 Cal.4th 287, 370-371.)

"Aggravated mayhem is a specific intent crime which requires proof the defendant specifically intended to cause the maiming injury, i.e., the permanent disability or disfigurement." (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.) Specific intent may be inferred from a number of factors, including the circumstances surrounding the act, the manner in which the crime is done, and the means used. (*Ibid.*)

Martinez, the murder victim, had visible tattoos that identified him as a member of East Side Paramount gang, the rival of appellant's gang, Brown Nation Paramount. A member of Brown Nation Paramount had been killed earlier that day. Appellant was holding a handgun when he left one of the three cars that stopped near the truck. Appellant spoke briefly to Alex, turned to Martinez, said "Look at this fool," and immediately fired at least nine shots at Martinez's chest. He walked back toward the car he had left but returned when Daniele started the truck's ignition. Daniele was leaning to the right in the driver's seat, holding Martinez with her left arm, which was crossed over her body. Appellant stood in the middle of the street, "out from the front driver's side of the tire." Their relative positions meant that Daniele's back was to appellant. Without saying anything, he fired at least four shots at her. One shot hit her in the back, paralyzing her.

The jury could reasonably find from the above facts that appellant both premeditated the attempted murder of Daniele and had the specific intent to permanently disable her, based in particular on the facts that he deliberately walked back toward the truck and immediately fired four shots at Daniele's back.

2. The Gang Expert

Appellant contends that the gang expert, Detective Santisteven, erroneously testified on ultimate fact issues in response to an overbroad hypothetical question that was based on the evidence the prosecution had presented. According to appellant, the improper testimony denied him due process of law, a fair trial, and a jury determination on all issues.

The first problem with appellant's argument is that there was no objection to the expert's testimony, so the issue is waived. (Evid. Code, § 353, subd. (a).)

Assuming arguendo that the issue was not waived, it lacks merit, as a gang expert may properly render an opinion based on the type of hypothetical question that was used here. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.)

3. Prosecutorial Misconduct

Appellant next argues that the prosecutor committed two instances of misconduct, denying him due process of law, a fair trial, and his right of confrontation.

A prosecutor's misconduct violates the federal Constitution if there is a pattern of conduct that is so egregious that the trial is infected with such unfairness that the conviction constitutes a denial of due process of law. Absent fundamental unfairness under federal law, prosecutorial misconduct violates state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*People v. Prieto* (2003) 30 Cal.4th 226, 260; *People v. Cunningham* (2001) 25 Cal.4th 926, 1000.)

There was no objection to either of the instances of purported prosecutorial misconduct that appellant discusses. The issue is therefore waived. (*People v. Cunningham*, *supra*, 25 Cal.4th at pp. 1000-1001.)

The lack of an objection is not surprising, as there was no misconduct. Therefore, contrary to appellant's assertion, his trial counsel did not render constitutionally ineffective assistance by failing to make an objection.

The two instances of alleged misconduct were:

(1) Detective McGuire testified that when he spoke with appellant in 1999, appellant said he belonged to the Brown Nation Paramount gang, its rival was the East Side Paramount gang, and he thought he was shot by East Side Paramount. The prosecutor asked McGuire whether appellant had a gun with him and whether appellant said he needed to take precautions to protect himself from East Side Paramount. The court sustained defense relevancy objections. Later, in response to defense questions on cross-examination, McGuire added that appellant said he did not "mess around anymore." The prosecutor argued at bench that the defense questions opened the door to the questions about appellant's gun that the court had not allowed. The court disagreed, finding that the subject of the gun appellant had in 1999 was irrelevant.

The prosecutor did not pursue the subject of the gun in 1999 once the court found it to be irrelevant. We do not view the brief questioning on that subject as misconduct, as the facts of the present incident involved appellant's use of a gun on a member of the East Side Paramount gang. Moreover, even if the questions were improper, there was no possible prejudice, as the jury was instructed not to consider questions to which objections were sustained.

(2) Appellant's second complaint of misconduct concerns the prosecutor's use in final argument of the following items of testimony: (a) The gang expert, Detective Santisteven, testified that appellant was "Chuy" of Brown Nation Paramount, which had 35 to 40 members; (b) Detective Schoonmaker testified that when Daniele saw the six-pack, Daniele said that appellant's photo and another photo looked familiar, she focused again on appellant's photo, and she then said, "He looks similar to the shooter"; and (c) Alex told Schoonmaker that the shooter was "Chuy" from Brown Nation Paramount and he knew him, as they attended Paramount High School together.

Based on the foregoing evidence, the prosecutor briefly told the jury that, given the "very limited group of people" in Brown Nation Paramount, the partial identification by Daniele and complete identification by Alex were very important. There was nothing improper in that argument, and there is no reasonable likelihood that the jury applied it in an objectionable fashion. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1001.)

4. Other Crimes and Character Evidence

Appellant contends that the cumulative effect of excessive inflammatory other crimes and bad character evidence resulted in gross unfairness and denied him a fair trial. Once again, the issue was waived for lack of an objection, and trial counsel was not ineffective for failing to object, as there was no basis for an objection.

Assuming arguendo that the issue was not waived, there was nothing wrong with the evidence or questions appellant attacks, which includes (a) the gang expert's testimony that appellant was a gang member, (b) the prosecutor's questions about appellant's having a gun in 1999, and (c) Detective Schoonmaker's testimony about how detectives construct six-packs.

5. The Issue Regarding Alex G.'s Belated Identification

Appellant argues that the trial court should not have allowed evidence of Alex's "supposed early adoptive admission he knew the shooter." What appellant labels as an "adoptive admission" appears to be the shrug that Alex gave when Detective Schoonmaker told him the police had discovered he knew the shooter's identity. According to appellant, the ruling on this issue denied him due process of law, a fair trial, the right to confrontation, and the right to the effective assistance of counsel.

During the trial, the prosecutor asked the court whether he could question Detective Schoonmaker about the underlying circumstances that led to Alex's identification of appellant's photo. The offer of proof was that Alex initially made no identification, but a confidential informant later told Schoonmaker that Alex said he knew who the shooter was. Based on what the informant said, Schoonmaker showed Alex a six-pack and said the police had learned that Alex knew the shooter's identity. Alex slumped in his chair and then reluctantly selected appellant's photo from a six-pack.

Defense counsel objected based on hearsay and late discovery. The trial court ruled that Detective Schoonmaker could testify about the circumstances of the identification in a limited way, without mentioning the confidential informant, to show the circumstances that caused Alex to identify appellant at the second interview after he failed to do so at the first interview.

Before the jury, Detective Schoonmaker testified that when Alex was first interviewed, Alex did not mention that he knew who the shooter was. At the next interview, Schoonmaker told Alex he had learned through his investigation that Alex knew the shooter's identity, and he understood why Alex was afraid to divulge that information. Although Alex was obviously fearful, he reluctantly cooperated. Appellant's photo was the third photo in the six-pack. Alex held up three fingers and put an arrow next to the third photo, but he refused to circle appellant's photo. When Schoonmaker asked if the third photo showed the shooter, Alex said yes.

We find no abuse of discretion or violation of appellant's constitutional rights in the ruling about the circumstances that surrounded Alex's identification of appellant's

photo at the second interview. (See, e.g., *People v. Burgener* (2003) 29 Cal.4th 833, 869 [for credibility, it was "well within the discretion of the trial court" to admit evidence that explained a witness's fear of testifying].) Moreover, since Alex had already testified that he identified appellant's photo at the second interview, there was no possible prejudice.

6. Failure to Instruct on an Admission

Appellant contends that the trial was fundamentally unfair because the trial court failed to give CALJIC No. 2.71 or a similar instruction, sua sponte, to tell the jury how to evaluate an admission by a defendant. He maintains that the evidence was replete with admissions, as Alex and Daniele testified that the shooter said he was from "BN" or "Brown Nation Paramount," and Alex also testified that the shooter asked, "Where you guys from?"

An admission is a statement by a defendant that does not acknowledge guilt but that tends to prove guilt when considered with the rest of the evidence. (CALJIC No. 2.71.) Statements by a perpetrator during an offense are not admissions, so there was no basis for an admission instruction here. Moreover, assuming arguendo that such an instruction should have been given, the lack of it caused no prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

7. Cumulative Error

As we have found no error, we reject appellant's contention that the cumulative effect of the errors denied him due process of law and a fair trial.

POSTTRIAL ISSUES

1. Background: Summary of the Posttrial Proceedings

Appellant was represented during the trial by Patrick Thomason of the alternate public defender's office.

The jury returned its verdict on June 8, 2007. The court then selected August 2, 2007, as the date for a court trial on the prior convictions, a hearing on a motion for new trial, and sentencing.

On July 11, 2007, appellant appeared with private counsel, James Barnes, and the court ordered the preparation of transcripts of the trial. August 29, 2007, was selected as the next court date.

Barnes appeared on August 29, 2007, after previously filing a written motion for continuance under section 1050. The court granted a continuance to October 17, 2007, for preparation of the motion for new trial.

On October 17, 2007, another attorney, Cortlen Hauge, appeared for Barnes and the case was continued to November 8, 2007.

On October 26, 2007, Barnes told the court that the new court date conflicted with his prepaid vacation, his expert needed additional time to evaluate the case, and his investigator was "checking on some new information" for the motion for new trial. The case was continued to December 5, 2007.

On December 5, 2007, Hauge appeared instead of Barnes and again requested a continuance. The trial court complained that Daniele had come to court that day in a wheelchair, and the court had spent two hours reviewing the file the previous night because a timely section 1050 motion was not filed. Also, almost six months had passed since the verdict. The prosecutor, Geoffrey Rendon, opposed the continuance. He complained that Barnes had not mentioned a continuance when they spoke together the previous day regarding discovery matters. The court continued the case to January 17, 2008, but it ordered that Barnes was to be personally present on that date, any written motions were to be filed at least five days in advance, and no further continuances would be granted.

At the December 5, 2007 proceedings, the court also asked Rendon to try to work out any discovery problems with Barnes. If that was not possible, Rendon could "either file a motion before the court, have Mr. Barnes come in, or have Mr. Barnes file a motion before the court [for] an after-conviction discovery proceeding[], to see whether [the discovery was] appropriate given the circumstances."

On January 9, 2008, Barnes filed another request for a continuance for further discovery, in his effort to "ascertain[] a possible constitutional basis for the new trial

motion." That same day, Barnes filed an extensive discovery motion, in which he sought 34 items of discovery that were not in the file he received from Thomason, appellant's former counsel. Among those items were Alex's and Daniele's prior criminal history, details about any benefits or promises they received, and specifics about why the detectives put appellant's photo into the six-packs that were shown to Daniele and Alex. The motion stated that the requested items of discovery "may form the basis for a motion for new trial" on such grounds as prosecutorial failure to disclose material evidence or ineffective assistance of counsel.

The prosecution's opposition to the discovery motion objected to many of the requested items but did not oppose discovery of Daniele's and Alex's prior criminal history. It indicated that Daniele had no prior convictions or arrests. Alex had three misdemeanors, which were for vandalism in 2000, driving without a valid license in 2005, and possession of a controlled substance in May 2006. Rendon, the prosecutor, added: "This information was disclosed orally to prior counsel before trial." Rendon was not sure that he discussed warrants with Thomason and was not sure about other convictions that might appear under different spellings of Alex's name.

On January 17, 2008, the court heard exhaustive arguments from Barnes and Rendon, reviewed the case law, and had the court reporter read back its previous order of no further continuances.

Barnes argued that he needed a continuance and further discovery "in order to develop the possible due process violations" caused by the People's failure to comply with discovery obligations and also to investigate the possibility of ineffective assistance of counsel. The court recognized that the trial occurred over six months earlier and it had ordered no further continuances. Barnes said he did not know about the order for no further continuances, as he did not speak personally with Hauge after the previous hearing. Rendon replied that he personally left a message at Barnes's office about that order, and he told Hauge to be sure to tell Barnes about it. Barnes wanted to call Thomason as a witness, to see if Rendon had in fact talked with Thomason about Alex's criminal record. Barnes said his own investigation, using various spellings of Alex's

name, showed that Alex had additional convictions. The court was not sure all of those convictions were actually Alex's. Rendon was sure he spoke with Thomason about Alex's criminal record. Rendon also pointed out that, in any event, Alex testified that he used to sell narcotics and used methamphetamine on the night of the incident.

The court then made a lengthy ruling, which we summarize as follows: The court's order of no further continuances was clear. The court had seen nothing unusual in Thomason's performance during the trial, and it had heard nothing since then, to show that there was either ineffective assistance of counsel or any undisclosed information that would have tended to change the results of the trial. The court believed that appellant had a right to postconviction discovery, but appellant had not shown that he was entitled to such discovery prior to the motion for new trial, as Barnes had presented nothing but speculative grounds for a motion for new trial. If there was a discovery issue after the motion for new trial was heard, appellant might have a basis for a writ or an appeal. Therefore, "based upon the lack of sufficient evidence to support post-conviction discovery prior to the motion for new trial, the request [was] denied."

The court then continued the proceedings for a few days, to January 22, 2008, to give Barnes an opportunity to file a motion for new trial and possibly a petition for writ of habeas corpus.

On the date of the January 22, 2008 proceedings, Barnes filed a long motion for new trial and again requested a continuance. Rendon filed an opposition. At the oral proceedings that day, the court refused to further continue the case, heard argument, and denied the motion for new trial. It then found that the allegations of prior convictions were true, declined to dismiss the strike prior, and sentenced appellant to 130 years to life in prison. It believed that a hearing for postconviction discovery was authorized by statute, so it set February 22, 2008, as the date for that hearing.

The parties again appeared in court on February 21, 2008. The court said it belatedly realized that appellant did not have a right to postconviction discovery, as the applicable statute, section 1054.9, applies only to postconviction proceedings that involve

defendants who are sentenced to death or life in prison without parole.[5] The discovery motion was taken off calendar, and appellant was committed to state prison to serve his sentence.

2. Denial of the Motion for New Trial

Appellant contends that the denial of his motion for new trial deprived him of due process, a fair trial, his right to confront witnesses, and his right to the effective assistance of counsel.

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion." (*People v. Davis* (1995) 10 Cal.4th 463, 524.) The trial court's ruling will not be disturbed on appeal absent a manifest and unmistakable abuse of discretion. (*Ibid.*)

The prosecution has a duty to disclose all substantial material evidence that is favorable to an accused. (*Brady v. Maryland* (1963) 373 U.S. 83, 87; *People v. Hayes* (1990) 52 Cal.3d 577, 611.)

Appellant contends that the motion for new trial should have been granted because Rendon did not disclose all of Alex's convictions, the existence of a warrant, or the fact Alex was on probation. Appellant argues that those facts showed that Alex was under pressure to cooperate and may have been more impaired from drug use than he indicated.

In a declaration accompanying the motion for new trial, Barnes said that appellant's previous counsel, Thomason, did not recall discussing Alex's rap sheet with Rendon. The rap sheet showed that Alex was placed on probation and ordered to pay a fine in June 2005 due to a conviction for driving on a suspended license. In June 2006, probation was revoked and a bench warrant was issued after Alex failed to pay the fine. That warrant was outstanding on September 5, 2006, at the time of the shootings here.

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5 Section 1054.9, subdivision (a) states that, upon an appropriate showing, a defendant is to be provided access to discovery materials, in cases that involve "the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed . . . ."

Alex was on probation at that time on three other cases, a conviction in January 2006 for driving on a suspended license and convictions in January and May 2006 for possession of a controlled substance.

In the opposition to the motion for new trial, Rendon said that, even if Thomason did not remember it, Rendon definitely recalled telling Thomason that Alex had three misdemeanor convictions. Those convictions were for vandalism in 2000, driving with a suspended license in 2006, and possession of a controlled substance in 2006.

Because there was confusion about what Alex's rap sheet showed, the trial court looked at it during the hearing on the motion for new trial. It took judicial notice that Alex had three prior convictions for driving with a suspended license and two for possession of a controlled substance. Its denial of the motion for new trial was based partly on the facts that Alex had no prior crimes of moral turpitude and the jury knew that Alex was a drug user.

Contrary to appellant's claims, we see nothing in Alex's criminal record to justify granting the motion for new trial for the reasons stated by the trial court.

Appellant also argues that the motion for new trial should have been granted because the People failed to disclose the promises and benefits that Alex received in exchange for his testimony. The record does not support that argument.

The pertinent facts appear in (a) the written documents filed by Barnes and Rendon, and (b) Rendon's summary at the new trial proceedings of a conversation he had with Detective Schoonmaker on the day of those proceedings. Those facts were that, prior to the preliminary hearing, Alex was relocated to another state at the expense of the sheriff's department. At the time of relocation, Alex was given plane tickets for himself and his family and a small amount of money, $200 to $300, for food and essentials. Alex received no further money, as he and his family soon abandoned relocation and lost contact with law enforcement. Police officers learned that Alex and his family may have returned to the Lakewood area as early as November 28, 2006, but efforts to contact them were not successful. A few days before the trial, Alex and his girlfriend were located in another state. Alex was brought back to Los Angeles, in custody. He remained in

custody until after he testified at the trial. The only benefits, monetary or otherwise, he received were the initial relocation cost and the cost of transporting him to Los Angeles after he was taken into custody.

Because the evidence established that the only benefits Alex received were minimal, the trial court did not err when it refused to grant a new trial on the basis of undisclosed benefits to Alex.

Appellant also argues that he was entitled to a new trial due to delayed disclosure of Detective Schoonmaker's words to Alex, and Alex's shrug, before Alex identified appellant's photo at the second interview. We find that the delayed disclosure was not material, as there is no reasonable probability that there would have been a different result if those facts had been disclosed to the defense prior to the trial. (See, e.g., *People v. Salazar* (2005) 35 Cal.4th 1031, 1049-1050.)

3. Denial of the Request for Continuance

Appellant also argues that the trial court denied him due process and the effective assistance of counsel when it refused to grant another continuance for further investigation in support of his motion for new trial. Given that over six months of continuances had already been granted and the possibility of further discovery was very speculative, we find no abuse of discretion or denial of appellant's constitutional rights in the denial of further continuances. (See *People v. Roybal* (1998) 19 Cal.4th 481, 505.)

4. Denial of Another Discovery Hearing After Sentencing

After it imposed sentence and advised appellant of his appeal rights, the trial court set February 22, 2008, as the date for a hearing on postconviction discovery. Rendon, the prosecutor, said he was unfamiliar with the procedure for such a hearing. The trial court explained: "It's handled like any other discovery motion. It's just a post, as opposed to pre-conviction discovery. I have another one pending on a death penalty case that the Supreme Court sent back for post-discovery motion as well, so it's authorized by statute."

The parties returned to court on February 21, 2008, one day early. The court said it had incorrectly set the matter for postconviction discovery, as it later discovered that there was "no statutory provision to provide for post-conviction discovery absent a writ

of habeas corpus and absent a case in which the sentence of death was imposed or life without possibility of parole."

Appellant's counsel, Barnes, said the court had correctly read the statute. He nonetheless objected, stating: "The court took the position prior to the hearing on the motion for new trial that the court need not take up the issue of discovery at that time, and put the issue of discovery over until today. [¶] It seems to me then that my client has been denied due process and denied equal protection under the law if the court declined to hear the motion for discovery at a time when the court had jurisdiction and the authority to order discovery, and instead, put the matter over to a time that the court did not have jurisdiction to order discovery. [¶] Submitted."

Rendon submitted the issue without further argument.

The court gave the following explanation of its reasoning:

> "The case was originally before the court on a motion for new trial. I don't recall, with specific detail, exactly all of the arguments that were made, nor all of my rulings. What I do recall with some specificity was that the motion for a new trial was denied, because there was not a statutory or legal basis for a new trial.
>
> "There were arguments made to the effect that things perhaps could have been done in a different way if counsel who is presently representing Mr. Peraza was representing him at trial, but I recall distinctly not making any findings that trial counsel was inadequate in any way.
>
> "Also I recall making statements to the effect that many of the arguments advanced by the defendant were speculative in nature. There was no new evidence, per say, that might dictate a finding sufficient to grant a new trial. Yes, I was under the impression that perhaps counsel would have a post-conviction opportunity for further discovery, but I was mistaken in that regard. Everything that I did up until the time that I did it had to do with the jurisdiction that has been conferred on me as the trial judge, namely, the motion for new trial and directing my comments to those issues.
>
> "If I made a mistake, I'm sure the Court of Appeal is going to tell me that I made a mistake, and give me appropriate instructions, but I think as it now stands, and as I recall, when you left, you were walking out of the door, and I was the one who mentioned that there's still something pending,

again, under the mistaken belief that there still was jurisdiction for post-conviction discovery.

> "It wasn't until after I called you back and after we set the matter and after I had an opportunity to look at the statute did I discover the folly of my ways, in that [section] 1054.9 is limited to habeas corpus matters in which death and/or life without possibility of parole was at issue.
>
> "That's where we are. The previously-imposed sentence by this court is to be carried out forthwith. Mr. Peraza is remanded. Mr. Peraza is ordered to be transported to the Department of Corrections with all due speed."

On appeal, the parties dispute whether the trial court still had jurisdiction to entertain the motion for postconviction discovery on February 21, 2008. We need not decide that issue because, assuming arguendo that the court did have jurisdiction, it considered and rejected appellant's discovery claims when it refused to grant further continuances for discovery on January 17, 2008. Specifically, it found that the claims were all speculative, like "pie in the sky," and appellant failed to show "sufficient evidence to support post-conviction discovery prior to the motion for new trial." We consider those findings in conjunction with (a) the significant time period that Barnes had already been given for discovery prior to January 17, 2008, and (b) the lack of evidence that anything changed regarding discovery between January 17, 2008, and February 21, 2008. We conclude that appellant suffered no possible prejudice from the court's refusal to revisit the discovery issue on February 21, 2008.

5. The Strike Conviction

The amended information alleged one prior strike, a juvenile adjudication of robbery that appellant committed when he was 16 years old. After the prosecutor presented the pertinent records, the trial court found that the juvenile adjudication qualified as a strike. Before the trial court, and on appeal, appellant has argued that the lack of a waiver of the right to jury means that it was unconstitutional to use a juvenile court offense to enhance appellant's sentence. We reject the issue because we must follow *People v. Nguyen* (2009) 46 Cal.4th 1007, 1010, in which the California Supreme

Court held that the United States Constitution permits this use of a prior juvenile adjudication. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

6. The Prison Priors

The trial court imposed but stayed two separate one-year enhancements under section 667.5(b) for convictions that resulted in prior separate prison terms. The offenses were: (1) a conviction in case No. BA241729 for violating Health and Safety Code section 11378 on April 23, 2003, and (2) a conviction in case No. TA066936 for violating Health and Safety Code section 1135 on April 30, 2003. The parties agree that appellant could have only one section 667.5(b) enhancement for those convictions. (*People v. Burke* (1980) 102 Cal.App.3d 932, 942-943.) We therefore order the striking of one of them.

DISPOSITION

The trial court is ordered to amend the abstract of judgment by striking one of the two stayed section 667.5(b) enhancements. A copy of the amended abstract of judgment shall be sent to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

LICHTMAN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.